

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

SUSAN OTTELE, on her own behalf and  
on behalf of the ESTATE OF ADAM J.  
COLLIER,

Plaintiff,

v.

OSCAR MARTINEZ AND AARON  
HODGES,

Defendants.

Case No. 1:22-cv-00187-JLT-CDB

FINDINGS AND RECOMMENDATION TO  
GRANT DEFENDANTS' MOTION FOR  
SUMMARY JUDGMENT

(Doc. 57)

**14-DAY OBJECTION PERIOD**

Plaintiff Susan Ottele is the mother of Adam Collier (Collier or Decedent), who died by suicide while incarcerated at Kern Valley State Prison in Delano, California, on October 17, 2020. Plaintiff filed the initial complaint on February 14, 2022 (Doc. 1), and the operative First Amended Complaint (FAC) on May 25, 2022. (Doc. 13). Plaintiff raises claims pursuant to 42 U.S.C. § 1983 for deliberate indifference against correctional officers Oscar Martinez and Aaron Hodges.<sup>1</sup> Plaintiff also raises Fourteenth Amendment substantive due process claims for loss of companionship, as well as California state law claims for failing to provide the Decedent with adequate mental and physical health care (Cal. Civil Code § 52.1), and a wrongful death and survival action under C.C.P. §§ 377.30, 377.60 *et seq. Id.*

<sup>1</sup> On March 2, 2023, Defendants filed a Notice of Death indicating that Defendant Hodges died on January 25, 2023. (Doc. 33). Defendant Hodges has not been dismissed from or substituted in this action.

Pending before the Court is Defendants' motion for summary judgment, filed November 3, 2023. (Doc. 57). Plaintiff filed an opposition on November 17, 2023 (Doc. 59), and Defendants filed a reply on November 27, 2023. (Doc. 60). Defendants' motion was referred by the assigned district judge to the undersigned for issuance of findings and recommendations on January 26, 2024. (Doc. 66). Thereafter, the Court ordered Plaintiff to respond to certain evidentiary challenges raised in Defendants' reply brief (Doc. 67) and Plaintiff filed a response on February 2, 2024 (Docs. 68, 69). For the reasons set forth below, the undersigned recommends that Defendants' motion for summary judgment be granted.<sup>2</sup>

## **BACKGROUND**

Adam J. Collier was an inmate at Kern Valley State Prison ("KVSP") at the time of his passing on October 17, 2020. (Doc. 13 ¶ 1). Collier entered the custody of the California Department of Corrections and Rehabilitation ("CDCR") on March 21, 2016, and was transferred to KVSP on March 10, 2020. (Doc. 59-4 p. 101).<sup>3</sup> Collier has a long-documented history of suicide attempts via various methods. According to CDCR records, those methods include attempted overdose by ingesting pills in 2006 (listed as "severe"), stabbing himself in the neck in February 2017 ("moderate"), cutting his neck with a paperclip in July 2019 ("minor-superficial") as well as an unspecified attempt to cut himself in August 2019 ("moderate"). (*Id.* p. 12).

Notably, on May 23, 2020, Collier committed self-harm ("minor-superficial") by using his toenail clippers to excoriate the top layer of his neck as well as the skin on his bicep. *Id.* According to a medical health form filed by KVSP staff on May 29, 2020, Collier denied intent to die, and stated that he harmed himself to avoid an unpaid drug debt. *Id.* at 12-13. The form documented that Collier had a history of high rescue, low risk behaviors without intent to die. *Id.*

After Collier's suicide attempt in May 2020, he was transferred to Facility C, Building

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<sup>2</sup> In her opposition to Defendants' motion for summary judgment, Plaintiff asserted the Court should stay the action until her then-pending appeal to the Ninth Circuit of this Court's ruling on her earlier motion to substitute named parties for Doe Defendants was resolved. (See Doc. 59 p. 29). Since that time, the Ninth Circuit has dismissed the appeal for lack of jurisdiction, thus mooting the issue. *See Ottele v. Martinez et al.*, No. 23-3084 (Doc. 18).

<sup>3</sup> Docket filings cited herein are referred to by the CM/ECF-assigned pagination.

1 eight, cell 221. (Doc. 57-2 ¶ 1). Cell 221 was located on the upper tier of the building. *Id.*  
2 Facility C is a special housing unit for inmates enrolled in the Enhanced Outpatient Program  
3 (“EOP”). (Doc. 59-4 pp. 33, 84). Inmates enrolled in the EOP receive a higher level of care from  
4 correctional officers. (*Id.* p. 33). In turn, correctional officers assigned to Facility C receive  
5 training on suicide prevention, including how to identify telltale signs of suicidal ideation. *Id.*

6 On October 17, 2020, Plaintiff was given breakfast in his cell during the morning hours.  
7 (*Id.* p. 100). Plaintiff did not report for the inmate count at noon. *Id.* Defendants Hodges and  
8 Martinez worked as floor officers in KVSP in the same facility where Collier was housed.  
9 Defendants’ shift on October 17, 2020, lasted from 2:00 p.m. to 10:00p.m. (Doc. 59-2 p. 2; Doc.  
10 59-4 p. 40). Defendants were responsible for conducting periodic checks on the inmates housed  
11 there. These checks included confirming whether the inmates were alive by visually observing  
12 them and counting “breathing flesh.” (Doc. 59-4 p. 41). Defendant Martinez conducted the count  
13 in the first tier of cells numbered 101 to 132, while Defendant Hodges conducted the count of the  
14 cells in the second tier. (*Id.* p. 82). On the date Collier died by suicide, a document to be read by  
15 correctional officers that sets forth their responsibilities while on duty – referred to as a “post  
16 order” – provides at Paragraph 2 that the floor officers were primarily responsible for maintaining  
17 order and security “for all areas of the housing unit.” (*Id.* pp. 35, 40). Paragraph 2 also provides:  
18 “You shall provide observation/coverage of all activities within your area of responsibility.” *Id.*

19 In a supplemental report drafted by Defendant Hodges at the request of J. Melvin two  
20 days after Collier’s death by suicide, Hodges reported that he observed Collier “in his cell on my  
21 [Hodges’] first security check. He was standing at the back of the cell and I asked him, ‘Hey  
22 what’s up Collier.’ Inmate Collier responded back, ‘Not much man.’” (Doc. 57-4 p. 50).

23 During his second inmate check at approximately 3:32 p.m., Hodges approached Collier’s  
24 cell and noticed that a bed sheet had been hung up, which partially blocked Hodges from fully  
25 seeing Collier. (Doc. 57-2 ¶ 6) (citing Doc. 57-5 “Welsh Decl.” ¶ 2 & Ex. A). Hodges attempted  
26 to get Collier’s attention by banging his hand on the cell door and shouting Collier’s name, but  
27 Collier would not respond. (Doc. 57-1 p. 4). Hodges then activated his personal alarm device  
28 and Martinez responded to Hodges’ alarm by going to Hodges’ location at Collier’s cell. This

1 was the first time that Martinez was on the second tier of the building during his shift that day.  
 2 Other prison staff also responded to the alarm, and Collier was removed from his cell in an  
 3 unresponsive condition. (*See Doc. 59-2 p. 3 n.7*).

4 According to the coroner's report, Collier was transported to a treatment and triage area at  
 5 around 3:40 p.m., and Collier was pronounced dead at 4:00 p.m. (Doc. 59-4 p. 100). Defendant  
 6 Hodges advised Deputy Coroner Mary Abidayo ("Abidayo") that Collier had previous suicide  
 7 attempts, including one attempt three years earlier during which Collier used a sharp object to cut  
 8 both sides of his neck, and prior incidents where Collier cut his own legs. *Id.* at 101. According  
 9 to Abidayo's report, Collier had a single cell designation due to in-cell violence. *Id.*

10 Abidayo arrived at Collier's cell at around 6:35 p.m. and noted that there was blood at the  
 11 head of Collier's bed. A plastic bag with blood-soaked towels also was located at the head of the  
 12 bed. *Id.* There was also a broken nail clipper at Collier's desk which had blood present on it. *Id.*  
 13 Abidayo found that Collier's death was due to exsanguination and ruled his death a suicide. *Id.* at  
 14 103.

15 Collier previously attempted suicide with nail clippers, as an inmate of KVSP, less than  
 16 five months prior to his successful attempt. Thereafter, according to a "Mental Health Form"  
 17 logged by a CDCR clinical psychologist on May 29, 2020, "[k]eeping sharp objects away will  
 18 assist to keep [Collier] safe." (Doc. 59-3 p. 9, #5 (citing Doc. 59-6 "Kantorová Decl." ¶ 5); Doc.  
 19 59-4 p. 19 (AG010923)). There were no medical or mental health care staff orders prohibiting  
 20 Collier from possessing sharp objects, including nail clippers, during the month before his death.  
 21 (Doc. 57-3 "Martinez Decl." ¶¶ 7, 13; Doc. 57-4 "Hancock Decl." ¶ 3).<sup>4</sup>

22 Officer Martinez was not aware that Collier was ever prohibited from possessing nail  
 23 clippers, nor that Collier ever possessed them. (Martinez Decl. ¶ 8). Martinez was not aware that  
 24 Collier previously attempted suicide, cut himself, or had cuts, marks, or other visible indications  
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26                 <sup>4</sup> Although Plaintiff in her opposition brief (Doc. 59 p. 22) and in her response to  
 27 Defendants' statement of undisputed facts (Doc. 59-2 p. 5, #16) challenges that no orders or  
 28 policies prohibited Collier from possessing sharp objects, none of the citations to which Plaintiff  
  refers in support of the dispute in fact establish that Collier was prohibited from possessing sharp  
  objects or that permitting Collier access to nail clippers violated any identified CDCR policy.

1 that he previously cut himself. (*Id.* ¶¶ 9-11). Further, Martinez was only ever aware of a calf  
 2 injury on Collier's leg, which to his knowledge was not the result of having attempted suicide or  
 3 inflicted self-harm. (*Id.* ¶ 12). Neither Martinez nor Hodges was authorized to access an  
 4 inmate's medical or mental health records, nor were they aware of Collier's mental health  
 5 condition. (*Id.* ¶ 13).<sup>5</sup>

6 If an inmate housed in the EOP was required to be treated differently than other inmates  
 7 generally were treated, for example through protective or precautionary measures, then this action  
 8 was required solely at the direction of the KVSP medical or mental health staff. *Id.* There is no  
 9 record evidence that Martinez or Hodges ever was directed to take any such measures concerning  
 10 Collier. (Martinez Decl. ¶ 13; Hancock Decl. ¶ 3).

#### 11 APPLICABLE LAW

12 Summary judgment is appropriate where there is "no genuine dispute as to any material  
 13 fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *Washington*  
 14 *Mutual Inc. v. United States*, 636 F.3d 1207, 1216 (9th Cir. 2011). An issue of fact is genuine  
 15 only if there is sufficient evidence for a reasonable fact finder to find for the non-moving party,  
 16 while a fact is material if it "might affect the outcome of the suit under the governing law."  
 17 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Wool v. Tandem Computers, Inc.*, 818  
 18 F.2d 1422, 1436 (9th Cir. 1987).

19 Each party's position must be supported by: (1) citing to particular portions of materials in  
 20 the record, including but not limited to depositions, documents, declarations, or discovery; or  
 21 (2) showing that the materials cited do not establish the presence or absence of a genuine dispute  
 22 or that the opposing party cannot produce admissible evidence to support the fact. See Fed. R.  
 23 Civ. P. 56(c)(1). The court may consider other materials in the record not cited to by the parties,

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24       <sup>5</sup> Once again, while Plaintiff in her opposition brief (Doc. 59 p. 22) and in her response to  
 25 Defendants' statement of undisputed facts (Doc. 59-2 p. 4, #10-13) challenges Martinez's  
 26 attestations to lack of knowledge of Collier's conditions and history of suicide attempts, she  
 27 advances only arguments that Martinez *should have* known about Collier's conditions, not that  
 28 he, in fact, did know. Similarly, Plaintiff disputes that Defendants had access to Collier's mental  
 health records by pointing out that they were obligated to share with medical staff relevant  
 observations and to refer suicidal inmates for treatment – none of which refutes that neither  
 Defendant could (or did) access Collier's mental health records. (*Id.* p. 5, #15).

1 but it is not required to do so. *See Fed. R. Civ. P. 56(c)(3); Carmen v. San Francisco Unified*  
 2 *School Dist.*, 237 F.3d 1026, 1031 (9th Cir. 2001) (on summary judgment, “the court has  
 3 discretion in appropriate circumstances to consider other materials, [but] it need not do so”).  
 4 Furthermore, “[a]t summary judgment, a party does not necessarily have to produce evidence in a  
 5 form that would be admissible at trial.” *Nevada Dep’t of Corr. v. Greene*, 648 F.3d 1014, 1019  
 6 (9th Cir. 2011) (citations and internal quotations omitted). The focus is on the admissibility of  
 7 the evidence’s contents rather than its form. *Fonseca v. Sysco Food Servs. of Arizona, Inc.*, 374  
 8 F.3d 840, 846 (9th Cir. 2004).

9 “The moving party initially bears the burden of proving the absence of a genuine issue of  
 10 material fact.” *In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 387 (9th Cir. 2010) (citing *Celotex*  
 11 *Corp. v. Catrett*, 477 U.S. at 317, 323 (1986)). To meet its burden, “the moving party must either  
 12 produce evidence negating an essential element of the nonmoving party’s claim or defense or  
 13 show that the nonmoving party does not have enough evidence of an essential element to carry its  
 14 ultimate burden of persuasion at trial.” *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Cos., Inc.*,  
 15 210 F.3d 1099, 1102 (9th Cir. 2000). If the moving party meets this initial burden, the burden  
 16 then shifts to the non-moving party “to designate specific facts demonstrating the existence of  
 17 genuine issues for trial.” *In re Oracle Corp. Sec. Litig.*, 627 F.3d at 387 (citing *Celotex Corp.*,  
 18 477 U.S. at 323). The non-moving party must “show more than the mere existence of a scintilla  
 19 of evidence.” *Id.* (citing *Anderson*, 477 U.S. at 252). However, the non-moving party is not  
 20 required to establish a material issue of fact conclusively in its favor; it is sufficient that “the  
 21 claimed factual dispute be shown to require a jury or judge to resolve the parties’ differing  
 22 versions of the truth at trial.” *T.W. Electrical Serv., Inc. v. Pac. Elec. Contractors Assoc.*, 809  
 23 F.2d 626, 630 (9th Cir. 1987).

24 The court must apply standards consistent with Rule 56 to determine whether the moving  
 25 party has demonstrated the absence of any genuine issue of material fact and that judgment is  
 26 appropriate as a matter of law. *See Henry v. Gill Indus., Inc.*, 983 F.2d 943, 950 (9th Cir. 1993).  
 27 “[A] court ruling on a motion for summary judgment may not engage in credibility  
 28 determinations or the weighing of evidence.” *Manley v. Rowley*, 847 F.3d 705, 711 (9th Cir.

1 2017) (citation omitted). The evidence must be viewed “in the light most favorable to the  
 2 nonmoving party” and “all justifiable inferences” must be drawn in favor of the nonmoving party.  
 3 *Orr v. Bank of America, NT & SA*, 285 F.3d 764, 772 (9th Cir. 2002); *Addisu v. Fred Meyer, Inc.*,  
 4 198 F.3d 1130, 1134 (9th Cir. 2000).

## 5 DISCUSSION

### 6 A. Plaintiff’s Objections to Defendants’ Evidence in Support of Motion for 7 Summary Judgment.

8 In response to Defendants’ motion for summary judgment, Plaintiff filed a document  
 9 cataloging her “objections” to evidence on which Defendants rely. (Doc. 59-1). The objections  
 10 are presented in a table identifying the evidence to which Plaintiff objects, the basis for the  
 11 objection, and prompts the Court to indicate a “ruling” per objection, either “sustained” or  
 12 “overruled.” The objections largely challenge the foundation and purported hearsay nature of the  
 13 referenced evidence.

14 With the exception of Plaintiff’s objections pertaining to the “Staff Narrative” portion of a  
 15 report about Collier’s death by suicide attached and/or referred to in the defense declarations of J.  
 16 Welsh, B. Hancock and J. Abuyen (Doc. 59-1 pp. 2-4), the Court declines Plaintiff’s request to  
 17 rule on the foundational and hearsay objections. “At the summary judgment stage, we do not  
 18 focus on the admissibility of the evidence’s form. We instead focus on the admissibility of its  
 19 contents.” *Fraser v. Goodale*, 342 F.3d 1032, 1036 (9th Cir. 2003). *Accord, Nevada Dep’t of*  
 20 *Corr.*, 648 F.3d at 1019; *Carmen*, 237 F.3d at 1031. If the contents of a document are presented in  
 21 a form that would be admissible at trial, the mere fact that the document itself might be  
 22 excludable hearsay provides no basis for refusing to consider it on summary judgment. *Fraser*,  
 23 342 F.3d at 1036-37.

### 24 B. Eighth Amendment Deliberate Indifference (Claims One through Three)

#### 25 1. Legal Standard

26 “[T]he Eighth Amendment’s prohibition against cruel and unusual punishment, made  
 27 applicable to the States through the Fourteenth Amendment’s Due Process Clause, requires the  
 28 State to provide adequate medical care to incarcerated prisoners.” *DeShaney v. Winnebago Cnty.*

1      *Dep’t of Soc. Servs.*, 489 U.S. 189, 198-99 (1989). To establish an Eighth Amendment claim on a  
 2 condition of confinement, such as medical care, a Plaintiff must show: (1) an objectively,  
 3 sufficiently serious, deprivation, and (2) the official was, subjectively, deliberately indifferent to  
 4 the inmate’s health or safety. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994). These two  
 5 requirements are known as the objective and subjective prongs of an Eighth Amendment  
 6 deliberate indifference claim. *Willhelm v. Rotman*, 680 F.3d 1113, 1122 (9th Cir. 2012); *Hallett*  
 7 *v. Morgan*, 296 F.3d 732, 744 (9th Cir. 2002).

8            To satisfy the objective prong, there must be a “serious” medical need. *Estelle v. Gamble*,  
 9 429 U.S. 87, 104 (1976). A medical need is serious if failure to treat it will result in “significant  
 10 injury or the wanton infliction of pain.” *Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir. 2006)  
 11 (quoting *McGuckin v. Smith*, 974 F.2d 1050, 1059 (9th Cir. 1992), *overruled on other grounds by*  
 12 *WMX Techs., Inc. v. Miller*, 104 F.3d 1133 (9th Cir. 1997) (en banc)). “[T]he conditions  
 13 presenting the risk must be ‘sure or very likely to cause ... needless suffering,’ and give rise to  
 14 ‘sufficiently imminent dangers.’” *Baze v. Rees*, 553 U.S. 35, 50 (2008) (Roberts, C.J., plurality  
 15 opinion) (quoting *Helling v. McKinney*, 509 U.S. 25, 35 (1993)).

16            As to the subjective prong, there must be deliberate indifference. Deliberate indifference  
 17 is “a state of mind more blameworthy than negligence” and “requires ‘more than ordinary lack of  
 18 due care for the prisoner’s interests or safety.’” *Farmer*, 511 U.S. at 835 (1994) (quoting *Whitley*  
 19 *v. Albers*, 475 U.S. 312, 319 (1986)); *see Toguchi v. Chung*, 391 F.3d 1051, 1060 (9th Cir. 2004)  
 20 (“Deliberate indifference is a high legal standard”). Deliberate indifference is shown when a  
 21 prison official knows that an inmate faces a substantial risk of serious harm and disregards that  
 22 risk by failing to take reasonable measures to abate it. *Farmer*, 511 U.S. at 847; *see also Gibson*  
 23 *v. Cnty. of Washoe, Nevada*, 290 F.3d 1175, 1187 (9th Cir. 2002).

24            The defendant must not only “be aware of facts from which the inference could be drawn  
 25 that a substantial risk of serious harm exists,” but he “must also draw the inference.” *Farmer*,  
 26 511 U.S. at 837. “If a [prison official] should have been aware of the risk, but was not, then the  
 27 [official] has not violated the Eighth Amendment, no matter how severe the risk.” *Gibson*, 290  
 28 F.3d at 1188 (citation omitted). This “subjective approach” focuses only “on what a defendant’s

1 mental attitude actually was.” *Farmer*, 511 U.S. at 839. *See Disability Rights Montana, Inc. v.*  
 2 *Batista*, 930 F.3d 1090, 1101 (9th Cir. 2019) (“The second prong is met upon showing of  
 3 deliberate indifference, which, as *Farmer* makes clear, is shown adequately when a prison official  
 4 is aware of the facts from which an inference could be drawn about the outstanding risk, and the  
 5 facts permit us to infer that the prison official in fact drew that inference, but then consciously  
 6 avoided taking appropriate action.”). Of course, whether a defendant possessed subjective  
 7 knowledge is a factual question that is “subject to demonstration in the usual ways, including  
 8 inference from circumstantial evidence.” *Farmer*, 511 U.S. at 842.

9       The Ninth Circuit holds that “[a] heightened suicide risk or an attempted suicide is a  
 10 serious medical need.” *Conn v. City of Reno*, 591 F.3d 1081, 1095 (9th Cir. 2010), *vacated*, 563  
 11 U.S. 915 (2011), *opinion reinstated in relevant part*, 658 F.3d 89 (9th Cir. 2011). Accord  
 12 *Simmons v. Navajo Cnty., Arizona*, 609 F.3d 1011, 1018 (9th Cir. 2010) (citing *Conn*, 591 F.3d at  
 13 1095), *overruled on other grounds by Castro v. Cnty. of LA.*, 833 F.3d 1060 (9th Cir. 2016) (en  
 14 banc). Where the alleged deliberate indifference involves an inmate’s death by suicide, the Ninth  
 15 Circuit has articulated the subjective test as follows: “To proceed to trial, [plaintiffs] must adduce  
 16 evidence raising a triable issue that [defendant knew decedent] was ‘*in substantial danger*’ of  
 17 *killing himself* yet deliberately ignored such risk.” *See id.* at 1019 (quoting *Clouthier v. Cnty. of*  
 18 *Contra Costa*, 591 F.3d 1232, 1248 (9th Cir. 2010)) (emphasis added). *See also id.* (“We cannot  
 19 agree, however, that the evidence supports the inference that [defendant knew decedent] ‘*was at*  
 20 *acute risk of harm*’ at the time he killed himself”) (quoting *Conn*, 591 F.3d at 1097) (emphasis  
 21 added).

## 22           **2. Analysis**

23       Here, Defendant does not dispute that Collier had serious medical needs relating to mental  
 24 health conditions while incarcerated. (Doc. 57-1 p. 6) (“Defendants do not dispute the objective  
 25 component—that Adam Collier’s risk of harming himself in his cell was sufficiently serious.”).  
 26 Thus, the issue presented by Defendants’ motion for summary judgment is whether Defendants  
 27 were subjectively aware that Collier faced a substantial risk of serious harm and disregarded that  
 28 risk by failing to take reasonable measures to abate it.

1 To establish that disputed issues of material fact exist sufficient to defeat summary  
 2 judgment relating to Defendants' deliberate indifference, Plaintiff asserts that as floor officers at  
 3 the EOP facility, Defendants should have known that Collier was at heightened risk of suicide.  
 4 (Doc. 59 p. 17). Furthermore, Plaintiff argues that given his history of suicide, Collier should  
 5 have been monitored more frequently and prioritized to a higher level of care. (*Id.* at 13). In light  
 6 of his prior self-harm using nail clippers as an inmate at KVSP, less than five months prior to his  
 7 death, Plaintiff also asserts Collier should never have been allowed to possess nail clippers. (*Id.*  
 8 at 12). Plaintiff also points to Collier's mental health safety plan, which provided that "keeping  
 9 sharp objects away helps keep him safe." *Id.* Plaintiff further argues that Collier should never  
 10 has been housed in a cell by himself, based on his requests and recommendations. *Id.* (citing  
 11 Kantorová Decl. ¶ 5).

12 None of these arguments – individually or collectively – establish any triable issue of  
 13 material fact as to whether Defendants *actually were* "aware of facts from which the inference  
 14 could be drawn that a substantial risk of serious harm exists," or that they "also dr[e]w the  
 15 inference." *Farmer*, 511 U.S. at 837. To be sure, the only facts and argument advanced by  
 16 Plaintiff that Defendants knew of Collier's risk of suicide was that they were floor officers at the  
 17 EOP facility and, thus, should have known Collier was at heightened risk of suicide.

18 It is undisputed both that inmates enrolled in the EOP receive a higher level of care from  
 19 correctional officers and that correctional officers assigned to Facility C received training on  
 20 suicide prevention, including how to identify telltale signs of suicidal ideation. (Doc. 59-4 p. 33).  
 21 However, that alone is not enough to demonstrate *either* that Defendants knew Collier was "in  
 22 substantial danger of killing himself" (*Simmons*, 609 F.3d at 1018-19) or that any such risk was  
 23 "obvious." *Farmer*, 511 U.S. at 843 n.8.

24 The Ninth Circuit has dismissed on summary judgment similar deliberate indifference  
 25 claims where the defendants had more notice of the decedent's risk factors than Defendants  
 26 possessed here. For instance, in *Simmons*, the defendant was aware of the decedent-inmate's risk  
 27 factors and was involved in decedent previously being placed on suicide watch. Notwithstanding  
 28 this, the Court dismissed the deliberate indifference claims, finding that the passage of one month

1 after a failed suicide attempt, further counseling, and unremarkable behavior in the following  
 2 month undermined a showing that defendant possessed subjective knowledge that the decedent  
 3 was at acute and substantial risk of suicide. *Simmons*, 609 F.3d at 1018.

4       Here, Plaintiff adduces no evidence reflecting or tending to suggest that Defendants knew  
 5 Collier was at substantial and acute risk of suicide. Indeed, Plaintiff has not refuted Defendant  
 6 Martinez's sworn assertions that he: (1) was not aware that Collier previously attempted suicide,  
 7 (2) was not aware that Collier ever was prohibited from possessing nail clippers, (3) was not  
 8 aware that Collier ever possessed nail clippers, or (4) either had access to or ever reviewed  
 9 Collier's medical or mental health records to discover anything concerning his mental health  
 10 condition. (Martinez Decl. ¶¶ 8-12).

11       On this record, because Plaintiff presents no disputed issues of material fact as to whether  
 12 Defendants either were aware that Collier presented any substantial and acute risk of suicide, or  
 13 inferred Collier presented such a risk, or whether any such risk was obvious, the undersigned will  
 14 recommend that Defendants' motion be granted as to Plaintiff's Eighth Amendment claims.

15           **C. Fourteenth Amendment Due Process (Claim Four)**

16           **1. Legal Standard**

17       Parents and children may assert a Fourteenth Amendment substantive due process claim if  
 18 they are deprived of the companionship of their child or parent through official conduct. *Lemire*  
 19 *v. Cal. Dep't. of Corr. & Rehab.*, 726 F.3d 1062, 1075 (9th Cir. 2013). However, only official  
 20 conduct that "shocks the conscience" is cognizable as a substantive due process violation. *Id.*  
 21 (quoting *Porter v. Osborn*, 546 F.3d 1131, 1137 (9th Cir. 2008)).

22       Deliberate indifference sufficient to sustain an Eighth Amendment claim generally shocks  
 23 the conscience "so as long as the prison official had time to deliberate before acting or failing to  
 24 act in a deliberately indifferent manner." *Id.* (citing *Tennison v. City and Cnty. of San Francisco*,  
 25 570 F.3d 1078, 1089 (9th Cir. 2009) & *Porter*, 546 F.3d 1131 at 1138). In an Eighth Amendment  
 26 prisoner-treatment case where a defendant-officer had ample time to correct his obviously  
 27 wrongful conduct, the Ninth Circuit generally applies the deliberate indifference standard to  
 28 determine whether alleged conduct "shocks the conscience." See *Peck v. Montoya*, 51 F.4th 877,

1 893 (9th Cir. 2022). A plaintiff also may satisfy the “shocks the conscience” standard by  
 2 showing that a state official “acted with the purpose to harm.” *Porter*, 546 F.3d at 1137.

3           **2. Analysis**

4           Here, the undersigned has found that Plaintiff cannot establish Defendants demonstrated  
 5 deliberate indifference sufficient to proceed on claims under the Eighth Amendment. Further,  
 6 Plaintiff has not alleged and does not argue in opposition to Defendants’ motion for summary  
 7 judgment that either Defendant acted with the purpose to harm Collier. (Doc. 59 pp. 24-25).  
 8 Accordingly, because Plaintiff’s substantive due process claim under the Fourteenth Amendment  
 9 is inextricably tied to the same allegations that form the basis of her Eighth Amendment claims,  
 10 the undersigned will recommend that Defendants’ motion be granted as to Plaintiff’s Fourteenth  
 11 Amendment claim. *See, e.g., Toguchi*, 391 F.3d at 1060 (“for the same reasons that the Toguchs’  
 12 deliberate indifference claim fails, their due process claim must also fail.”).

13           **D. California Bane Act (Claim Five)**

14           **1. Legal Standard**

15           California’s Bane Act, Cal. Civ. Code § 52.1, provides a right of action to plaintiffs for  
 16 damages “against any person, whether acting under the color of law or not, who interferes with or  
 17 attempts to interfere ‘by threats, intimidation, or coercion with the exercise or enjoyment’ of their  
 18 civil rights under the laws of the United States or California.”” *Martinez v. Cnty. of Sonoma*, No.  
 19 15-cv-01953-JST, 2015 WL 5354071, at \* 9 (N.D. Cal. Sept. 14, 2015) (quoting *M.H. v. Cnty. of*  
 20 *Alameda*, 90 F. Supp.3d 889, 896 (N.D. Cal. 2013)).

21           To prevail on a Bane Act Claim, a plaintiff must allege and show that the defendant  
 22 intentionally interfered with another’s civil rights via threats, intimidation, or coercion. *Reese v.*  
*Cnty. of Sacramento*, 888 F.3d 1020, 1044 (9th Cir. 2018). “Nothing in the text of the statute  
 23 requires that the offending ‘threat, intimidation or coercion’ be ‘independent’ from the  
 24 constitutional violation alleged.” *Cornell v. City & Cnty. of San Francisco*, 17 Cal. App.5th 766,  
 25 800 (2017). In addition, “a reckless disregard for a person’s” constitutional rights is evidence of a  
 26 specific intent to deprive that person’s rights. *Reese*, 888 F.3d at 1045 (citation and quotation  
 27 omitted).

1           “California’s Bane Act requires proof of an underlying constitutional violation.”  
 2       *Williamson v. City of Nat’l City*, 23 F.4th 1146, 1155 (9th Cir. 2022) (reversing a district court’s  
 3 denial of summary judgment because there was no proof of underlying constitutional violation);  
 4       *Barela v. Cnty. of Orange*, No. 8:21-cv-00799-JVS (DFMx), 2022 WL 17037430, at \*9 (C.D.  
 5 Cal. Aug 4, 2022) (granting motion for summary judgment on Bane Act claim after finding  
 6 summary judgment appropriate for underlying First, Fourth, and Fourteenth Amendment claims);  
 7       *Mkrtchyan v. Sacramento Cnty.*, No. 2:17-cv-02366-DAD-KJN, 2023 WL 8698524, at \*21 (E.D.  
 8 Cal. Dec. 15, 2023) (same).

9           **2.       Analysis**

10          As Defendants are entitled to summary judgment on all of Plaintiff’s underlying  
 11 constitutional claims, Plaintiff’s Bane Act claim also fails. Accordingly, the undersigned will  
 12 recommend that Defendants’ motion be granted as to Plaintiff’s Bane Act claim. *See Williamson*,  
 13 23 F.4th at 1155; *see also Barela*, 2022 WL 17037430, at \*9 (“Where, like here, a plaintiff brings  
 14 a Bane Act claim and a § 1983 claim based on the same alleged constitutional violations, the  
 15 elements of the predicate constitutional violations are the same under both claims.”).

16          **E.       Wrongful Death and Survivor Action (Claim Six)**

17           **1.       Legal Standard**

18          The elements of a California wrongful death claim are: (1) a wrongful act or neglect on  
 19 the part of one or more persons that (2) causes (3) the death of person. *Estate of Prasad ex rel.*  
 20 *Prasad v. Cnty. of Sutter*, 958 F. Supp.2d at 1101, 1118 (E.D. Cal. 2013); Cal. Civ. Proc. Code §  
 21 377.60. “Although it is a statutorily-created action, a wrongful death suit predicated on  
 22 negligence must still contain the elements of actionable negligence.” *Deloney v. Cnty. of Fresno*,  
 23 No. 1:17-cv-01336-LJO-EPG, 2019 WL 1875588, at \*9 (E.D. Cal. Apr. 26, 2019). “A  
 24 negligence claim requires proof that (1) defendant had a duty to use care, (2) defendant breached  
 25 that duty, and (3) the breach of duty was the proximate or legal cause of the resulting injury.” *Id.*  
 26 (citing *Hayes v. Cnty. of San Diego*, 57 Cal.4th 622, 629 (2013)). *See Wright v. Yanos*, No. 2:15-  
 27 cv-02671-TLN-CKD, 2017 WL 6040335, at \*6 (E.D. Cal. Dec. 6, 2017) (“[T]he plaintiffs can  
 28 prevail on a wrongful death claim by merely establishing negligence, which has been defined as

1 the want of such care as a person of ordinary prudence would exercise under the circumstances of  
 2 the case, [and] may consist in heedlessly doing an improper thing or heedlessly refraining from  
 3 doing a proper thing.”) (quotation and citation omitted).

4       “*A negligent act ‘is not the proximate cause of [a plaintiff’s] alleged injuries if another*  
 5 *cause intervenes and supersedes [defendant’s] liability for the subsequent events.’”* *Campos v.*  
 6 *Cnty. of Kern*, No. 1:14-cv-01099-DAD-JLT, 2017 WL 915294, at \*14 (E.D. Cal. Mar. 7, 2017)  
 7 (quoting *Conn*, 591 F.3d at 1101). “*A cause is intervening and superseding if it is*  
 8 *unforeseeable.”* *Id.* (citation omitted). “*As a general rule, acts of suicide have been found to be*  
 9 *unforeseeable events that preclude a finding of causation.”* *Id.* However, courts have recognized  
 10 an exception to this general rule in cases where a government official’s actions or inaction were  
 11 “*the moving force*” behind a sequence of events that ultimately lead to a foreseeable harm being  
 12 suffered, including suicide. *Id.* (citing cases).

13       In *Campos*, an inmate who harmed himself while in-custody was moved to a suicide-  
 14 watch cell that was not monitored by a camera. *Id.* at \*1. The defendant correctional officers  
 15 discovered the inmate in his cell with a cord noose fastened around his neck and tied to the cell  
 16 bars. The noose was fashioned from a section of the electrical cord of a fan located in the  
 17 hallway outside of decedent’s cell. *Id.* The court denied defendants’ motion for summary  
 18 judgment on a wrongful death claim because the defendants were aware that an electric fan was  
 19 placed outside the suicide watch cell in question, providing circumstantial evidence of  
 20 negligence. The court reasoned that “*the defendants’ leaving of an electric fan with a duct-taped*  
 21 *cord near a suicide cell, at least arguably within reach of a suicidal detainee, could be considered*  
 22 *by a rational trier of fact to be the ‘moving force’ behind decedent’s ultimate suicide.”* *Id.* at \*15.

23       In contrast, the court in *Weishaar v. Cnty. of Napa* granted summary judgment to the  
 24 defendant correctional officer on a successor in interest’s wrongful death cause of action for the  
 25 in-custody death by suicide of her husband. No. 14-cv-01352-LB, 2016 WL 7242122 (N.D. Cal.  
 26 Dec. 15, 2016). The inmate’s suicide happened on the defendant’s watch approximately 25  
 27 minutes after his last security check. *Id.* at \*8. Although the defendant had no knowledge of  
 28 reports regarding the decedent’s suicide risk, he characterized the decedent as appearing “really

1 down” in the hours leading up to the suicide, received reports from the decedent that he was bi-  
 2 polar, in need of medication and about to “lose it,” and cried. *Id.* at \*4, \*8. Based on this record,  
 3 and because the facility’s medical and housing staff were responsible for assessing and addressing  
 4 the decedent’s needs (not the correctional officer), the court found there were no triable issues of  
 5 fact as to the defendant’s responsibility for the death by suicide and granted summary judgment.

## 6           **2.         Analysis**

7           Neither party reasonably challenges that Defendants (as correctional officers) owed  
 8 Collier (an inmate where Defendants served) a duty of care. *See Cotta v. Cnty. of Kings*, 686 Fed.  
 9 Appx. 467, 469 (9th Cir. 2017) (“In California, prison officials owe detainees a duty to protect  
 10 them from foreseeable harm.”) (citing *Giraldo v. Cal. Dep’t of Corr. & Rehab.*, 168 Cal. App.4th  
 11 231 (2008)). Thus, the undersigned considers whether any conceivable breach of duty by  
 12 Defendants caused Collier’s death.

### 13           **(i) Possession of Nail Clippers**

14           The undersigned found above in connection with her constitutional claims that Plaintiff  
 15 has presented no triable issue of material fact that Defendants had any knowledge Collier  
 16 presented a heightened risk of suicide. In light of this, it cannot be said that Defendants’ alleged  
 17 failure to prevent Collier from possessing nail clippers was the “moving force” behind Collier’s  
 18 eventual death by suicide. *See Campos*, 2017 WL 915294, at \*14. Whereas in *Campos*, the  
 19 defendant correctional officers were aware the decedent was suicidal but nevertheless placed him  
 20 in a cell where he could access material to construct a noose to facilitate the suicide, here, there  
 21 was no foreseeable reason for Defendants to prevent Collier from accessing nail clippers. Indeed,  
 22 Plaintiffs have not persuasively refuted Defendants’ showing there were no medical or mental  
 23 health care staff orders prohibiting Collier from possessing sharp objects, including nail clippers,  
 24 during the month before his death, and that such nail clippers could be purchased by inmates at  
 25 the canteen. (*See Martinez Decl.* ¶ 13; *Hancock Decl.* ¶ 3).

### 26           **(ii) Security Checks**

27           The parties forcefully dispute whether Defendant Hodges checked on and communicated  
 28 with Collier at 2:00 p.m. during Hodges’ first security check of the day, as he claimed in a

1 supplemental report but which was not mentioned in his original incident report. (Doc. 57-4 p.  
 2 50).<sup>6</sup> In particular, Plaintiff relies on the expert report and a supplemental declaration filed in  
 3 opposition to Defendants' motion for summary judgment by Dr. James Lee. In the supplemental  
 4 declaration (Doc. 59-7), Dr. Lee opines that because it would have taken Collier more than four  
 5 hours to die by exsanguination and given that Collier's time of death at 3:32 p.m., it is not  
 6 possible Hodges saw and spoke with Collier at 2:00 p.m. as Collier would not have been able to  
 7 stand at that time. Dr. Lee further opines that Collier would not have had enough dexterity to  
 8 affix the bedsheet found in his cell at the time of his death *after* his conversation with Hodges due  
 9 to lack of dexterity from exsanguination.

10 Defendants implore the Court to disregard Dr. Lee's supplemental declaration because it  
 11 presents opinions not included in his disclosed Rule 26(a)(2)(B) expert report.<sup>7</sup> (Doc. 60 p. 4).  
 12 Plaintiff counters that the opinions, in fact, "fall within the scope of his expert report and his  
 13 skills, experience, and educational background." (Doc. 68 p. 2). Plaintiff further asserts that  
 14 Defendants were aware of Dr. Lee's views regarding these challenged opinions because he  
 15 offered deposition testimony during expert discovery related to those opinions. (*Id.* pp. 2-3).  
 16 Finally, Plaintiff argues exclusion is not warranted for any discovery violation under Rule 37  
 17 because any late disclosure either was harmless or substantially justified. (*Id.* p. 3).

18 Rule 26(a)(2) requires disclosure of an expert report for each expert that may offer  
 19 testimony at trial that includes, among other things, "a complete statement of all opinions the  
 20 witness will express and the basis and reasons for them" as well as the facts considering in

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21         <sup>6</sup> The Court rejects Plaintiff's argument that Defendant Hodges' supplemental report is  
 22 inadmissible and should not be considered by the Court on summary judgment; the report  
 23 satisfies the public records and business records exceptions to hearsay. Fed. R. Evid 803(6) and  
 24 (8); *Greer v. Cnty. of San Diego*, No. 19cv378-JO-DEB, 2023 WL 2316203, at \*7 (S.D. Cal. Mar.  
 25 1, 2023) (finding investigative records following an inmate suicide satisfied the public record  
 26 exception); *Anglin v. Pratti*, 643 F. Supp.3d 1077, 1085-86 (E.D. Cal. 2022) (finding written  
 27 statements by floor officers pertaining to inmate complaint admissible under the public records  
 28 exception).

29         <sup>7</sup> In response to Defendants' challenge that the supplemental expert declaration should be  
 30 disregarded, at the Court's direction, Plaintiff filed supplemental briefing arguing that the  
 31 supplemental declaration was within the scope of his timely disclosed expert report. *See* Docs.  
 32 68, 69.

1 forming those opinions. Fed. R. Civ. P. 26(a)(2)(B).

2 Additionally, “Rule 26(e) creates a ‘duty to supplement,’ not a right. Nor does Rule 26(e)  
3 create a loophole through which a party who submits partial expert disclosures, or who wishes to  
4 revise her disclosures in light of her opponent’s challenges to the analysis and conclusions  
5 therein, can add them to her advantage after the court’s deadline for doing so has passed.” *Luke v.*  
6 *Family Care and Urgent Medical Clinics*, 323 Fed. Appx. 496, 500 (9th Cir. 2009) (affirming  
7 exclusion of supplemental expert report submitted in opposition to motion for summary  
8 judgment) (unpublished). A supplemental expert report that merely seeks to “strengthen” or  
9 “deepen” opinions expressed in the original expert report does not fall within the permissible  
10 scope of supplemental expert disclosures under Rule 26(e). *City of Seattle v. Monsanto*  
11 *Company*, No. C16-107-RAJ-MLP, 2023 WL 7046271, at \*8-9 (W.D. Wash. Oct. 26, 2023)  
12 (excluding untimely supplemental expert report); *Bell v. Boeing Co.*, No. 20-cv-01716-LK, 2022  
13 WL 1206728, at \*3-5 (W.D. Wash. Apr. 22, 2022) (same); *Jarrow Formulas, Inc. v. Now Health*  
14 *Group*, No. CV 10-8301 PSG (JCx), 2012 WL 3186576, at \*15 (C.D. Cal. Aug. 2, 2012) (same).

15 The undersigned has compared the challenged opinions in Dr. Lee’s supplemental  
16 declaration with the opinions disclosed in his expert report and finds it likely that Plaintiff’s  
17 supplemental expert declaration should be excluded given Plaintiff’s failure to disclose it  
18 consistent with Rule 26(a)(2)(B) prior to the close of expert discovery. The failure to include in  
19 Dr. Lee’s timely disclosed Rule 26(a) expert report the opinions newly disclosed in opposition to  
20 Defendants’ motion for summary judgment does not appear either justified or harmless given that  
21 the scheduled trial date is rapidly approaching and, with expert discovery closed, Defendants have  
22 no opportunity to depose Dr. Lee. *See* Fed. R. Civ. P. 37(c)(1).

23 Nevertheless, whether Plaintiff’s supplemental declaration of Dr. Lee is admissible is an  
24 issue that need not be dispositively resolved for the purposes of Defendants’ motion for summary  
25 judgment. Instead, the undersigned finds *even if* Defendant Hodges first encountered Collier  
26 approximately 90 minutes after his shift began (*e.g.*, at 3:32 p.m.), Plaintiff still has failed to  
27 identify any triable issues of material fact as to whether Defendants’ actions were the proximate  
28 or legal cause of Collier’s death – as Plaintiff must to proceed with a wrongful death claim. In

1 particular, no conduct alleged by Defendants, including any delay during the first 90 minutes of  
 2 their shift to conduct a security check of Collier, was “the moving force” behind Collier’s death  
 3 by suicide. *Cf. Campos*, 2017 WL 915294, at \*14 (disputed issue of fact as to a correctional  
 4 officer’s placement of a suicidal inmate where he could access material to fashion a noose) *with*  
 5 *Weishaar*, 2016 WL 7242122, at \*4, \*8 (granting summary judgment to correctional officer  
 6 where the facility’s medical and housing staff were responsible for assessing and addressing the  
 7 decedent’s suicide needs). *Accord Germaine-McIver v. Cnty. of Orange*, No. SACV 16-01201-  
 8 CJC (GJSx), 2018 WL 6258896, at \*17 (C. D. Cal. Oct. 31, 2018) (granting summary judgment  
 9 on wrongful death claim where defendants had no advance knowledge of the inmate’s suicidal  
 10 intentions).<sup>8</sup>

11 Accordingly, the undersigned will recommend that Defendants’ motion be granted as to  
 12 Plaintiff’s wrongful death and survival claim.

### 13 FINDINGS AND RECOMMENDATION

14 Based on the foregoing, IT IS HEREBY RECOMMENDED:

- 15 1. Defendants’ motion for summary judgment (Doc. 57) be **GRANTED**.  
 16 2. The Clerk of Court be **DIRECTED** to close this case.

17 These Findings and Recommendations will be submitted to the United States District  
 18 Judge assigned to this case pursuant to the provisions of 28 U.S.C. § 636(b)(1). **Within fourteen**  
 19 **(14) days** from the date of service of these Findings and Recommendations, any party may file  
 20 written objections with the Court. The document should be captioned, “Objections to Magistrate  
 21 Judge’s Findings and Recommendations.” A failure to file objections within the specified time  
 22 may result in waiver of that party’s rights on appeal. *Wilkerson v. Wheeler*, 772 F.3d 834, 839  
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24 <sup>8</sup> The undersigned separately notes that Defendants may be entitled to immunity from  
 25 liability for wrongful death under Cal. Gov. Code § 845.6. *See, e.g., Germaine-McIver*, 2018 WL  
 26 6258896, at \*16-17; *Frary v. County of Marin*, 81 F. Supp.3d 811, 842 (N.D. Cal. 2015).  
 27 However, Defendants did not move for summary judgment on this ground, have not addressed  
 28 immunity under Cal. Gov. Code § 845.6, and it is not the Court’s province to manufacture  
 arguments on behalf of the parties. *E.g., Chandler v. Cal. Dep’t of Corr. & Rehab*, No. 1:21-cv-  
 01657-JLT-HBK, 2022 WL 2818646, at \*1 (E.D. Cal. July 19, 2022); *California v. Johnson*, No.  
 2:18-cv-01056-KJM-CKD, 2018 WL 4214650, at \*4 (E.D. Cal. Sept. 5, 2018).

1 (9th Cir. 2014) (citing *Baxter v. Sullivan*, 923 F.2d 1391, 1394 (9th Cir. 1991)).

2 IT IS SO ORDERED.

3 Dated: February 16, 2024

  
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UNITED STATES MAGISTRATE JUDGE